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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1977

No. 77-1396

THE STATE OF IDAHO, on relation of MARJORIE RUTH MOON, State Treasurer of the State of Idaho,

Petitioner,

v.

STATE BOARD OF EXAMINERS, and the Legislature of the State of Idaho, by and through ALLAN F. LARSEN, Speaker of the House, and JAMES ELLSWORTH, President Pro-Tem of the Senate,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Opinion of the District Court and the Opinion of the United States Court of Appeals for the Ninth Circuit are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did the United States Court of Appeals for the Ninth Circuit commit error in abstaining from taking jurisdiction over an action brought against the State Board of Examiners and State Legislature of Idaho by the State Treasurer to recover alleged losses to the Idaho Public School Endowment Fund, on the grounds that abstention should be granted within the meaning of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) where "principles resting on considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation' were involved".

CONSTITUTIONAL PROVISIONS, STATUTES, AND LAWS INVOLVED

The constitutional provisions, statutes and laws involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

Petitioner's Complaint, filed in the United States District Court for the District of Idaho on April 26, 1976, revolves around alleged losses to the Public School Endowment Fund of the State of Idaho. Petitioner forwarded two claims for relief in that Complaint. The first involved an alleged loss to the Public School

Endowment Fund resulting from the sale of United States Government Bonds by the Endowment Fund Investment Board. The second claim concerned use of interest derived from the Public School Endowment to pay the expenses of the Investment Board.

On September 17, 1976, Petitioner filed an action in the Idaho State Supreme Court entitled *Moon* v. *Investment Board* seeking an Alternative Writ of Prohibition against the Board. Numerous alleged illegal practices were asserted. One of the issues raised in that case is identical to the second claim for relief in the Complaint in the instant case. However, unlike this case, Petitioner was not attempting to regain alleged losses paid out by the Investment Board in prior years. Rather, the State action was designed to prohibit the Investment Board from continuing such activities.

The Idaho Supreme Court quashed all of the issues presented except the issue concerning payment of expenses from the School Endowment Fund. In *Moon* v. *Investment Board*, 98 Idaho 200, 560 P.2d 871 (1977), the Court held that transfer of earnings from public school funds for the purpose of defraying expenses of the Investment Board was improper, and found the statutory authority allowing such authority to be unconstitutional. The Legislature, in response to the State Supreme Court decision, appropriated a sum of money to compensate the Fund for monies paid for expenses of the Investment Board in prior years. The legislative language, codified in Chapter 188, 1977 Idaho Session Laws, is as follows:

> Section 5. There is hereby appropriated from the general account to the public school income fund the amount of $994,200.00 for full and final payment of expenditures incurred and paid in current and prior years by the endowment fund investment board from earnings on public school endowment fund investments.
>
> Approved March 30, 1977.

The District Court by Memorandum Decision dated March 9, 1977, (App. B of Petition, p. 23) concluded that subject matter jurisdiction over the case existed through the Idaho Admission Act, 26 Stat.L. 215 (1890). However, the Court granted Respondent's Motion to Dismiss "in consideration of wise judicial administration". (App. B of Petition, p. 26). The Court of Appeals affirmed the judgment of the District Court. (App. A of Petition, p. 19). In the words of the Court of Appeals:

> Although the court did have jurisdiction over the suit, we think nevertheless that it acted wisely in dismissing it under the doctrine announced in Colorado River Water Conservation District, supra. The suit is one between two branches of state government, and involves the interpretation of state constitutional provisions substantially similar to those in the Idaho admissions act. (App. A of Petition, p. 21).

The Court of Appeals concluded that Petitioner's dispersal of the issues between State and Federal forums violated the policy requiring comprehensive disposition of litigation. (App. A of Petition, p. 22).

ARGUMENT

I

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND DECISIONS OF THE UNITED STATES SUPREME COURT.

Petitioner contends that the decision of the Court of Appeals is in conflict with the requirements of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976) and other decisions of this Court. However, on close review, the conflict quickly dissolves. Although numerous decisions stress the need to use abstention sparingly, this Court has through the years been willing to keep abstention as a viable doctrine and to broaden its horizons. This is apparent from a reading of *Colorado River Water Conservation District* v. *United States*, *supra*. The Court concluded that the McCarren Amendment, 43 U.S.C. §666, did not preclude District Court jurisdiction under 28 U.S.C. §1345. However, the Court considered the fact that a similar action concerning an adjudication of water rights was pending in the State Courts of Colorado. Although the Court found absent the three broad categories for abstention frequently cited, it continued to examine the facts of the case and concluded that abstention was nevertheless appropriate:

> Although this case falls within none of the abstention categories there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous

> exercise of concurrent jurisdiction, either by federal courts or by state and federal courts. These principles rest on considerations of '[w]ise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation.' [citations omitted]. 424 U.S. at 817.

The Court went on to say:

> In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum [citation omitted], the desirability of avoiding piecemeal litigation [citation omitted], and the order in which jurisdiction was obtained by the concurrent forums [citation omitted]. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors councelling against that exercise is required [citation omitted]. 424 U.S. at 818-819.

When this case is viewed in the light of "considerations of wise judicial administration", it becomes apparent that the Court of Appeals did not err in granting abstention for this reason. The Idaho Admission Bill, 26 Stat.L. 215 (1890), which provided the basis of federal question jurisdiction, is only peripherally involved in the instant litigation. The primary thrust of this case, as noted by the Circuit Court, is a suit "between two branches of state government, and involves the interpretation of state constitutional provisions substantially similar to those in the Idaho Admissions Act". (App. A of Petition, p. 21). The challenges raised by

Petitioner turn ultimately, not on the Idaho Admission Act, but on an interpretation of Article IX, §§3 and 4, *Idaho Constitution* and State statutes enacted in compliance with these constitutional provisions. Interestingly, each of the provisions referred to by Petitioner in her Complaint are contained in the cited State constitutional sections.

As earlier observed, Petitioner's second claim for relief was addressed by the State Supreme Court of Idaho in *Moon* v. *Investment Board*, 560 P.2d 871 (Idaho 1977). The State Court granted the relief sought by Petitioner. However, the claim made in State Court did not include a demand for monies previously paid from the Permanent School Fund for expenses of the Endowment Fund Investment Board. This, of course, was subsequently appropriated by the Idaho Legislature. In any event, Petitioner at that time could easily have avoided piecemeal litigation by bringing the entire claim for review before the Supreme Court of Idaho. This could also easily have been done as to claim one in the Complaint. Avoidance of piecemeal litigation through abstention was specifically referred to in *Colorado River Water Conservation District*, *supra*. In addition to *Moon* v. *Investment Board*, *supra*, it is instructive to observe that similar claims have been brought in the past in the State Courts of Idaho. See e.g., *Moon* v. *Investment Board*, 96 Idaho 140 (1974), and *Engelking* v. *Investment Board*, 93 Idaho 739 (1970).

When the facts are carefully reviewed, it becomes clear that this Complaint represents a dispute between entities

within State government concerning management of State funds which should be decided by the State Courts in Idaho. Whether or not the government bonds were sold at a loss by the Endowment Investment Board is a question of fact that will ultimately turn on an interpretation of State law. Also, whether or not expenses paid to the Board from the Fund in prior years should be replaced into the Fund is properly a question for the Idaho Legislature. A suit against the Idaho Legislature and the constitutionally created Board of Examiners strikes at the very heart of this State's policy making entities and should be avoided in Federal Court if at all possible.

In short, the Idaho Admission Bill was used by Petitioner simply as a means to gain access into Federal Court. The issues genuinely involved State statutory interpretation and the Idaho Constitution. The claims also concern decisions made by the highest authorities in the State of Idaho and go to the heart of this State's policy decisions. The Treasurer of the State of Idaho has many times in the past presented similar claims to the Idaho State Courts. There is no contention that the State Courts have ever failed to grant these claims a fair review. In fact, analysis of recent decisions discloses that Petitioner has largely been successful in the Courts of Idaho. The need to grant abstention under the holding of *Colorado River Water Conservation District*, *supra*, was aptly explained by the Circuit Court of Appeals:

> Appellant has shown no reason to justify the fracturing of this dispute between branches of the state government into several suits, or to justify

> their dispersal through state and federal forums. Sound judicial policy requires the "comprehensive disposition of litigation." That was the concern expressed by the supreme court in Colorado River Water Conservation District, supra, and that was the same concern expressed by the district judge.
>
> We conclude that the district judge acted properly and wisely in dismissing the suit. Affirmed. (App. A of Petition, p. 22).

Contrary to the contentions of Petitioner, the decision of the Court of Appeals carefully follows the principles expressed by this Court in *Colorado River Water Conservation District*, *supra*.

II

THE DECISION OF THE COURT OF APPEALS IS NOT ERRONEOUS AND IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

The doctrine of abstention is judgemade law, having its origin in the case of *Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496 (1941). Principally, it is an equitable doctrine, giving rise to discretionary consideration by the Court. The Doctrine recognizes the intricate balance between the State and Federal systems and attempts to avoid needless friction with policies of the States. See *Druker* v. *Sullivan*, 458 F.2d 1272 (1st Cir. 1972). For this reason Courts considering abstention must carefully balance the competing consideration involved and in so doing, it is obvious that "the doctrine of abstention cannot readily be reduced to a simple

formula. 'There have been as many and as variegated applications of this supple principle as the situations that have brought it into play' ". *Diaz Gonzalez* v. *Colon Gonzalez*, 536 F.2d 453 (1st Cir. 1976), Citing *Railroad Commission* v. *Pullman Company*, *supra* at page 500.

Analysis of the District Court Memorandum Opinion and Decision of the Circuit Court reveals that both jurisdictions were careful to comply with this Court's language in *Colorado River Water Conservation District*, *supra*. In considering abstention, this Court said:

> No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors councelling against that exercise is required. 424 U.S. at 818-819.

The Court, after carefully weighing abstention within the light of the above quote, dismissed the case for wise judicial administration on the grounds that the Federal Courts provided an inconvenient forum and Plaintiff had engaged in piecemeal litigation concerning the same issues between the State and Federal Courts.

Petitioner's contention that the decision of the Court of Appeals conflicts with the decisions of other circuits also is in error. Petitioner maintains that the decision below conflicts with *Timmons* v. *Andrews*, 538 F.2d 584 (4th Cir. 1976) as far as abstention is concerned. The decision in *Timmons* conflicts not at all with the Courts opinion below. This is true for two reasons. First, the Court in *Timmons* found that there was no suggestion

indicating "that resolution of the state law issues will dispose of the case without consideration of the federal questions". 538 F.2d at 585. In this case, Petitioner specifically appealed to the Idaho Supreme Court on portions of the very issues now raised in the federal forum. Had piecemeal litigation been avoided, the State Supreme Court decision would have been dispositive. In fact, it appears that Petitioner's second claim is moot because of that decision and legislative action taken pursuant thereto. This was not the case in *Timmons*. Secondly, the Fourth Circuit in *Timmons* did not consider whether the case should be dismissed under principles of wise judicial administration as ennunciated in *Colorado River Water Conservation District*, *supra*. Although the case is cited, it is referred to merely to indicate the three *traditional* grounds for abstention in civil actions. This Court's holding in *Colorado River Water Conservation District* was in no way reviewed by the Fourth Circuit.

III

THE GENERAL REASONS FOR REVIEW ON CERTIORARI SPECIFIED IN RULE 19, SUPREME COURT RULES, ARE ABSENT.

Considerations governing review on certiorari of decisions of the Federal Courts of Appeal are contained in Rule 19(b), Supreme Court Rules. Review of the reasons stated in Rule 19, Supreme Court Rules, does not suggest any reason applicable to this situation. As the Circuit Court below stated:

> The suit is one between two branches of state government and involves the interpretation of state

constitutional provisions substantially similar to those in the Idaho Admissions Act. (App. A of Petition, p. 21).

In short, the issues raised in this action involve internal management decisions of Idaho State government. The reason for the dismissal was abstention. The decisions below were carefully fashioned under the requirements of *Colorado River Water Conservation District*, *supra*, and no substantial federal questions are presented.

CONCLUSION

Rule 19(1), Supreme Court Rules, provides in part that "A review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefore". The Courts below have carefully followed the latest pronouncements on abstention by this Court. The issues in the case are confined specifically to various branches of government within the State of Idaho. No special and important reasons exist for a review by this Court on Writ of Certiorari. For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

DATED This 12th day of May, 1978.

GUY G. HURLBUTT
Chief Deputy Attorney General
State of Idaho
Statehouse
Boise, Idaho 83720

STATE OF IDAHO)
) ss.
County of Ada)

GUY G. HURLBUTT, being first duly sworn, deposes and says: That he is the attorney representing Respondent in the above-entitled case. That on the date stated below, he served the BRIEF FOR RESPONDENT IN OPPOSITION upon Wayne P. Fuller, Special Assistant Attorney General, State of Idaho, counsel for Petitioner, by depositing three copies thereof in a United States Post Office, with United States postage prepaid on the 12th day of May, 1978.

GUY G. HURLBUTT

SUBSCRIBED AND SWORN to before me this 12th day of May, 1978.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho